Filed 9/23/14 Baribeau v. Superior Court CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ROBERT CHARLES BARIBEAU, Petitioner, v. THE SUPERIOR COURT OF SAN BERNARDINO COUNTY, Respondent; THE PEOPLE, Real Party in Interest.	E061501 (Super.Ct.Nos. FWV1002386 & FWV1102692) OPINION

ORIGINAL PROCEEDINGS; petition for writ of mandate. Ingrid Adamson Uhler, Judge. Petition granted.

The Law Offices of Jeffrey R. Lawrence and Jeffrey R. Lawrence for Petitioner.

No appearance for Respondent.

Michael A. Ramos, District Attorney, and Brent J. Schultze, Deputy District Attorney for Real Party in Interest.

DISCUSSION

In this matter we have reviewed the petition and the opposition filed by real party in interest. We have determined that resolution of the matter involves the application of settled principles of law, and that issuance of a peremptory writ in the first instance is therefore appropriate. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178.)

There can be no dispute that the search of petitioner's cell phone was illegal under the authority of *Riley v. California* (2014) __ U.S. __ [134 S.Ct. 2473, 189 L.Ed.2d 430] (*Riley*). We do not agree that there was "binding appellate" authority in existence at the time the phone was seized authorizing the seizure and search of information under *Davis v. United States* (2011) 564 U.S.___ [131 S.Ct. 2419, 180 L.Ed.2d 285]. Insofar as some justices of our Supreme Court *later* theorized that United States Supreme Court precedent justified the search, they were wrong. (See *People v. Diaz* (2011) 51 Cal.4th 84 (*Diaz*).) In fact the split decision in *Diaz* certainly indicates that at the time of the seizure in this case, its legality was in doubt.

We also note that due to the fact that the decision in *Riley*, *supra*, __ U.S. __ [134 S.Ct. 2473, 189 L.Ed.2d 430] post-dated the hearing in this case, the issue of the officers' reliance on *any* authority was not established. The same analysis applies in the People's favor, however, with respect to any other possible exceptions to the warrant requirement. For example, the People now argue that the information would necessarily have been seized later under warrant and the "inevitable discovery" rule applies. We decline to hold

as a matter of law that this rule applies in the absence of any specific, directed testimony on the point, but as the state of the law at the time of the hearing did not put the People on notice of the need for such evidence, remand will be ordered.

DISPOSITION

The petition for writ of mandate is granted on the grounds set forth above; our limited request for a preliminary response reflects our view that the arguments under *Kellett v. Superior Court* (1966) 63 Cal.2d 822 are repetitive and meritless.

Let a peremptory writ of mandate issue, directing the Superior Court of San Bernardino County to vacate its order denying petitioner's motion to suppress evidence under Penal Code section 1538.5. The court shall order further briefing and set a further hearing to determine whether the People can establish the admissibility of the challenged evidence under any exception to the warrant requirement.

Petitioner is directed to prepare and have the peremptory writ of mandate issued, copies served, and the original filed with the clerk of this court, together with proof of service on all parties.

The previously ordered stay is lifted.

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CODRINGTON
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.